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SUPREME COURT OF THE UNITED STATES

October Term, 1960

No. 867

RAYMOND H. COMER, - - - - Petitioner,

versus

UNITED STATES OF AMERICA, - - Respondent,

PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

PETITION FOR WRIT OF CERTIORARI AND APPENDIX FOR RAYMOND H. COMER, PETITIONER.

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Supreme Court of the United States

RAYMOND H. COMER, - - - - - *Petitioner.*

v.

UNITED STATES OF AMERICA, - - *Respondent,*

ON PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

PETITION FOR RAYMOND H. COMER, PETITIONER.

The official report of the Opinion of the Circuit Court of Appeals for the Sixth Circuit has not as yet been printed in bound volume form. A copy of the Opinion of the Circuit Court of Appeals for the Sixth Circuit is found in the Appendix to this Petition on Page 1-A.

BASIS OF JURISDICTION.

The basis for jurisdiction is the fact that this is a Petition of Writ of Certiorari from a conviction of a Federal crime in a Federal District Court which was sustained by a Judgment of the Circuit Court of Appeals for the Sixth Circuit. The Judgment of the Circuit Court of Appeals for the Sixth Circuit is dated March 6, 1961. The Judgment of the United States

District Court for the Eastern District of Kentucky is dated March 10, 1960. The Order overruling the Motion for judgment of Acquittal and Motion and Grounds for a New Trial is dated March 18, 1960.

The Supreme Court of the United States of America has jurisdiction to review these Judgments by reason of Title 28, Section 1254(1), United States Code. The United States District Court for the Eastern District of Kentucky had jurisdiction of the trial by reason of Title 18, Section 3231, United States Code, since the alleged crime was a violation of Title 26, Sections 4411 and 4401, United States Code, and Title 18, Section 371, United States Code.

QUESTIONS PRESENTED FOR REVIEW.

The questions presented for review are:

Count I.

Did the Circuit Court of Appeals commit error in failing to reverse Judgment of the Federal District Court, Eastern District of Kentucky, which entered a Judgment of Conviction and overruled Petitioner's Motion for Judgment of Acquittal, pursuant to Rule 29, and in the alternative, his Motion and Grounds for New Trial when all of the overt acts in furtherance of the alleged conspiracy to violate Title 26, Section 4411, United States Code (Gambling Tax Stamp) proven were as consistent with innocence as with guilt and where all of the overt acts were committed either after the crime had been committed and the conspiracy

had been accomplished or many years prior thereto and where there was no showing of knowledge on the part of the petitioner that the Gambling Tax Stamp had not been purchased by his co-defendant, who represented himself, and was the sole proprietor of the gambling operation.

Count II.

Did the Circuit Court of Appeals commit error in failing to reverse Judgment of the Federal District Court, Eastern District of Kentucky, which entered a Judgment of Conviction and overruled Petitioner's Motion for Judgment of Acquittal, pursuant to Rule 29, and in the alternative, his Motion and Grounds for new Trial when there was absolutely no proof, either direct or circumstantial, that the Excise Tax imposed by Title 26, Section 4401, United States Code (Tax on Wagers Received) was not paid as required by Statute.

STATUTES INVOLVED.

Title 18, Section 371, United States Code.

"Conspiracy to commit offense or to defraud United States. If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

"If, however, the offence, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

Title 26, Section 4411, United States Code.

"*IMPOSITION OF TAX.* There shall be imposed a special tax of $50 per year to be paid by each person who is liable for tax under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable."

Title 26, Section 4401, United States Code.

"*IMPOSITION OF TAX.*

(a) Wagers.—There shall be imposed on wagers, as defined in section 4421, an excise tax equal to 10 percent of the amount thereof.

"(b) Amount of wager.—In determining the amount of any wager for the purposes of this subchapter, all charges incident to the placing of such wager shall be included; except that if the taxpayer establishes, in accordance with regulations prescribed by the Secretary or his delegate, that an amount equal to the tax imposed by this subchapter has been collected as a separate charge from the person placing such wager, the amount so collected shall be excluded.

"(c) Persons liable for tax.—Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for

and shall pay the tax under this subchapter on all wagers placed in such pool or lottery.

STATEMENT OF FACTS.

The petitioner, Raymond H. Comer, was convicted in the United States District Court for the Eastern District of Kentucky for conspiring with John J. Lang to willfully attempt to evade and defeat the special tax imposed by Title 26, Section 4411 USC, commonly referred to as "The Fifty Dollar Stamp Tax" imposed before a person may enter into the business of wagering. On a second count the petitioner was also convicted at the same trial of willfully attempting to evade and defeat the excise tax imposed by Title 26, Section 4401 USC, which is the ten per cent tax on all wagers received by one engaged in the business of wagering. The petitioner was sentenced under these convictions to two one year and a day terms in the penitentiary, said terms to be served concurrently, and a fine of Two Thousand ($2,000) Dollars (4a) on Count II.

John J. Lang was also indicted and convicted at the same trial. Lang was not represented by counsel.

The District Court had jurisdiction by reason of Title 18 Section 3231 U.S.C.

From 1939 to the present time, petitioner operated a restaurant known as Comer's Bar and Restaurant at 684 South Broadway, Lexington, Kentucky, and owned the building and premises located at this address.

In 1958, after petitioner was divorced, he constructed and moved into an additional room on the

second floor of the premises. This room was his living quarters from this time until the present date.

On or about January 15, 1959, petitioner rented another upstairs room to John J. Lang. John J. Lang operated a handbook in this room from this date until a raid by the Internal Revenue Service on May 14, 1959. It is a crime under the statutes of Kentucky to operate a handbook.

The raid was the result of an investigation by Joseph B. Spink, Criminal Investigator for the Internal Revenue Service. In the course of his investigation agent Spink first secured admittance to the betting room of John J. Lang and placed a bet with Lang on April 4, 1959, at which time the business of wagering was being conducted. Agent Spink testified that in order to get into the betting room it was necessary to go up some stairs and through a wooden door in the middle of which was a small, one way mirror, from which persons inside the betting room could see those trying to gain admittance while the ones outside could not see in. Agent Spink further testified that he went into the betting room on nine different occasions from April 4, 1959 through May 14, 1959, the day of the raid, and on every occasion on which agent Spink placed a bet, they were accepted by Lang. Petitioner was seen in the betting room by agent Spink on at least three occasions, but on only one occasion did petitioner according to Spink, appear to be connected with the booking operation in any way. On that one occasion, April 8, 1959, agent Spink and Lang had a difference of opinion as to whether a bet made by Spink

was a win bet or a place bet. Lang then telephoned and stated to someone that he wanted to see "Raymond", that he needed the sheets for a prior day. Some ten minutes later petitioner went through the betting room, disappeared through a door, returned with some papers, left them on the counter in front of Lang, and went to the rear of the betting room. On several occasions petitioner had allowed Lang to place these papers in his room when Lang was going bowling or other places merely as an accomodation for Lang. Lang looked at the papers and mentioned to petitioner that they were the wrong papers. Then petitioner went back and secured the correct papers and Lang paid off the bet to Spink. Petitioner took no part in the discussion but rather walked to the rear of the betting room after he had delivered the papers.

Petitioner's living quarters were in a room off the betting room and the only way petitioner could get to his room was through the betting room. It was testified to that Lang was asked by petitioner not to throw the forms and scratch sheets in the trash in the parking lot behind the building, and that thereafter, the maid or someone destroyed them. However, the official records of Lang as to who had bet on what horse, the amount they had bet and how much he paid them, said record being known as "Writer's Sheet", were taken by Lang to his home, and that only on rare occasions were they destroyed. Lang testified that he used an extension of the telephone of Raymond Comer during the first month of his operation until he could secure telephones of his own, and that, at this time, he requested one

Raymond Kanter, a person other than petitioner, to secure two telephones which were installed in the betting room by the telephone company and that the telephones were paid for by Lang. Lang further testified that the loudspeaker system in the betting room was owned by him and he paid for the race results which came over the speaker system. There was no proof to show that petitioner had a proprietary interest in the handbook.

No evidence was introduced that during the period from April 4, 1959, through April 30, 1959, the time alleged in the indictment that the ten per cent excise tax on wagering was not paid. Lang stated that he had not paid the excise tax from January 15, 1959, to March 31, 1959. However, by his later testimony, he stated that he did pay the tax for subsequent months, but that he did owe a part of one of the subsequent months. No identification was made of which month he had not paid the tax.

Both Lang and petitioner testified that petitioner had no proprietary interest in the bookmaking operation and that petitioner was solely the landlord of Lang.

Counsel for petitioner moved for a judgment of acquittal at the close of the government's testimony and and also at the close of petitioner's proof. Counsel for petitioner also, after the verdict of the jury was rendered and within five days after the jury was discharged, requested in writing for a judgment of acquittal and in the alternative moved for a new trial. All of said motions of counsel for petitioner were pursuant to Rule 29, Federal Rules of Criminal Procedure and all of said

motions were overruled. An appeal to the United States Circuit Court of Appeals for the Sixth Circuit was unsuccessful.

ARGUMENT.

It is earnestly contended that this case warrants the attention of the Supreme Court of the United States of America because of the complete disregard by the District Court and the Circuit Court of Appeals of the rulings of the Supreme Court of the United States of America heretofore rendered and that by reason of this fact the petitioner's liberty and property will be taken away from him and he will be confined in the penitentiary without an adequate basis for his confinement.

The petitioner will argue each of the two counts of the indictments separately.

Count I is the conspiracy count for failure to pay the $50.00 stamp tax as set out in Title 26, Section 4411, United States Code.

Count II deals with the charge of failure to pay the 10% excise tax on wagers as required by Title 26, Section 4401, United States Code.

Count I of the Indictment.

Petitioners contention with reference to the conspiracy as set out in Count I of the indictment is reduced to a minimum as follows:

(a) That there was no proof petitioner was engaged in the business of accepting wagers in his own behalf or engaged in receiving wagers

on behalf of another and, hence, it was necessary to prove petitioner knew John J. Lang was liable for the tax and had not paid it. This knowledge on the part of petitioner was not proven.

(b) That all of the overt acts as set out in the indictment either occurred several months after the crime for which the alleged conspiracy was formed had in fact occurred or many years prior thereto. The crime was that of engaging in the business of wagering without first paying the $50 stamp tax and said crime occurred on or about January 15, 1960.

(c) All of the facts were as consistent with innocence as with guilt and the government did not meet the burden required to sustain a conviction.

There is no question but petitioner knew that Lang was running a bookmaking operation on the premises leased by petitioner to Lang; however, no competent evidence was introduced that petitioner was either one who is "engaged in the business of accepting wagers" as a "principal * * * on his own account", or one who is engaged in receiving wagers for and on behalf of any person who is engaged in the business of accepting wagers.

In case of

United States v. *Calamaro*, 354 U. S. 351, 1 L. Ed. 2d 1394, 77 S. Ct. 1138 (1957),

the question presented was whether a so-called pick-up man in a type of lottery called a number game is sub-

ject to the $50 stamp tax. The facts were undisputed that respondent in that case had worked for people engaged in the numbers racket and had picked up wagers for delivery to the principal. It should be noted that the respondent had knowledge of the operation and was actually assisting in carrying out the lottery operation.

The respondent had been convicted for failing to pay the occupational tax but his conviction had been reversed by the Circuit Court of Appeals. Sustaining the reversal, the Court said:

> "The Government disclaims this ground for upholding the respondent's conviction, as indeed it must, in light of the unambiguous legislative history showing that the excise tax applies only to one who is 'engaged in the business of accepting wagers' as a 'principal * * * on his own account.' In this instance, that means the banker, as the Government concedes."

Since the decision in that case, the law has been amended to provide for the payment of the tax by anyone "who is engaged in receiving wagers for and on behalf of any persons so liable." The principal, however, remains the same that here we have a runner who was aiding, assisting and abetting in carrying on a gambling enterprise but the Court would not hold him as principal subject to the tax.

Only two persons knew exactly what the relationship was between petitioner and Lang and they were the parties themselves. Lang testified positively and without equivocation that petitioner had no proprietary

interest in the bookmaking operation but that petitioner was only his landlord at a specific rental of Two Hundred ($200) Dollars per month. Lang so testified even though such testimony was against his interest. Petitioner also testified positively that he had no interest in the bookmaking operation and that his sole and only relation with Lang was that of landlord. Hence any conviction would require speculation as to another relationship other than the one testified to and the record is devoid of any evidence of any relationship other than that of landloard and tenant.

Petitioner was not, therefore, liable for the $50 occupational tax which was not paid and as a result it was incumbent on the United States to prove by competent evidence that petitioner knew that Lang, who was liable for said tax, had not in fact paid the tax. This is spelled out in the case of

> *Ingram v. United States,* 360 U. S. 672, 3 L. Ed. 2d 1503, 79 S. Ct. 1314 (1959).

In that case two operators of a Georgia numbers game, Ingram and Jenkins, who were themselves liable for federal taxes on gambling, along with their two clerical functionaries at the headquarters of the operation, Smith and Law, who were not personally liable for such taxes, were convicted of conspiracy to evade and defeat the payment of the 10% tax on wagers and the $50 stamp tax.

This conviction was sustained by the United States Circuit Court of Appeals but was reversed by the Supreme Court. On the trial of the case it was over-

whelmingly established that the two principals had evaded the taxes required by Section 4401 and 4411 of the United States Code and the question resolved itself as to whether or not the two men had admittedly worked with them could be held responsible under the conspiracy count. The Supreme Court stated:

> "Certainly there is nothing in the record to show that Smith and Law knew that Ingram and Jenkins had not paid the taxes, a fact obviously within the knowledge of the latter.
>
> "It is fundamental that a conviction for conspiracy under 18 USC Sec. 371 cannot be sustained unless there is 'proof of an agreement to commit an offense against the United States.' Periera v. United States, 347 U. S. 1, 12, 98 L. Ed. 435, 446, 74 S. Ct. 358. There need not, of course, be proof that the conspirators were aware of the criminality of their objective, but an essential ingredient of the proof was knowledge on the part of Smith and Law that Ingram and Jenkins were liable for federal taxes by reason of the gambling operation. 'Without the knowledge, the intent cannot exist.' Direct Sales Co. v. United States, 319 U. S. 703, 711, 87 L. Ed. 1674, 1681, 63 S. Ct. 1265.
>
> "'Conspiracy to commit a particular substantive offense cannot exist without *at least* the degree of criminal intent necessary for the substantive offense itself.' The substantive offense which Smith and Law were accused of conspiring to commit was the willful evasion of federal taxes, an offense which, even presuming knowledge of the tax law, obviously cannot be committed in the

absence of knowledge of willfulness. Spies v. United States, 317 U. S. 492, 87 L. Ed. 418, 63 S. Ct. 364, supra. Cf. United States v. Falcone, 311 U. S. 205, 85 L. Ed. 128, 61 S. Ct. 204.

"Indulging, as of course we must, in that view of the evidence most favorable to the Government, *we simply cannot discern adequate foundation in the present record for a finding that Smith and Law had such knowledge of Ingram's and Jenkins' wagering tax liability. The record is completely barren of any direct evidence of such knowledge.* It was not shown, for example, that any reference had ever been made by any of the petitioners to possible tax liability, or that they had filed a return or paid a tax in previous years. The Government relied instead upon evidence which, it asserts, circumstantially proved the requisite knowledge on the part of Smith and Law. These circumstances were simply the intimate connection of Smith and Law with the operation of the lottery itself, their cooperation in conducting it secretly, and their apparent knowledge that it was conducted at a profit. The Government points out that not only would payment of the taxes have decreased the profits to be derived from operation of the lottery, but in addition would have required registration, including the names and addresses of the bankers and writers, with the local internal revenue office and the posting of a wagering tax stamp at the place of business. 26 USC (Supp. V) Secs. 4412, 6806(c). The information contained in the registration would have been available to local law enforcement officials. 26 USC (Supp V) Sec. 6107.

"Yet these circumstances actually are colorless as to the vital issue of knowledge on the part of Smith and Law that their superiors owed federal wagering taxes. Certainly *the secrecy of the operation did not go to show that knowledge.* This is not a case where efforts at concealment would be reasonably explainable only in terms of motivation to evade taxation. Here, the criminality of the enterprise under local law provided more than sufficient reason for the secrecy in which it was conducted. A conspiracy, to be sure, may have multiple objectives, United States v. Rabinowich, 238 U. S. 78, 86, 59 L. Ed. 1211, 1214, 35 S. Ct. 682, and if one of its objectives, even a minor one, be the evasion of federal taxes, the offense is made out, though the primary objective may be concealment of another crime. See Spies v. United States, supra (317 U. S. at 499). But the fact that payment of the federal taxes by Ingram and Jenkins might have resulted in disclosure of the lottery and subsequent prosecution of Smith and Law by local authorities would permit an inference that concealment of the lottery was motivated by a purpose to evade payment of federal taxes only if, independently, there were proof that Smith and Law knew of the tax liability. *Evidence that Smith and Law might have wanted the taxes to be evaded if they had known of them, and that they engaged in conduct which could have been in furtherance of a plan to evade the taxes if they had known of them, is not evidence that they did know of them.*" (Emphasis writer's).

Certainly the facts proven in the *Ingram* case were stronger for conviction of Smith and Law, who were

clerical functionaries in the central office of the gambling enterprise, than are the facts proven in the instant case for the conviction of the petitioner who was the owner of the premises and landlord of the person engaged in the business of wagering.

Thus, it appears that the mere fact that petitioner knew that gambling was taking place on the premises did not make him responsible for the purchase of the $50.00 tax stamp. There is no showing that petitioner had any knowledge that Lang had not purchased a tax stamp. As shown by the above cited cases, guilty knowledge is essential. In addition to a guilty knowledge, it must affirmatively be shown by the Government that petitioner had a proprietory interest in the handbook operation. All of the facts shown are as consistent with a landlord-tenant relationship as with a proprietary interest in the handbook. For these reasons, we feel that the Government clearly failed to meet the burden required for conviction.

In the case of

Lewis v. *United States*, 348 U. S. 419, 99 L. Ed. 475, 75 S. Ct. 415 (1955),

the Supreme Court held the $50 occupational tax must be paid by the person engaged in the business of wagering before he enters into said business. The Court stated:

> "These provisions must be read together, and when we do, it seems clear that payment of the special $50 tax is to be made prior to engaging in the business of accepting wagers."

This being so, the substantive crime of non-payment of tax occurred on the first day of engaging in the business of accepting wagers without the payment of the $50 gambling tax.

The overt acts necessary to prove a conspiracy must be proved to have occurred during the terms of the conspiracy and prior to the consummation of the contemplated crime.

Bollenbach v. *United States*, 326 U. S. 607, 90 L. Ed. 350, 66 S. Ct. 402 (1946).

As the Court stated in

Hall v. *United States*, 109 F. 2d 976, 984, 10th Cir. (1940):

"The overt act must be a subsequent independent act following the conspiracy and done to carry into effect the object thereof, and *cannot succeed the completion of the contemplated crime.*" (Emphasis writer's.)

Furthermore, in

Dahly v. *United States*, 50 F. 2d 37, 42 (8th Cir., 1939),

the Court there said:

"A conspiracy under section 37 Cr. Code (18 USCA Sec. 88) is an agreement by two or more persons to commit an offense against the United States. The gist of the offense is the conspiracy; that is, the agreement between two or more persons to effect the unlawful end; *but before the offense is a completed one,* * * *.'" (Emphasis writer's.)

In

Grunewald v. *United States*, 353 U. S. 391, 404, 1 L. Ed. 2d 931, 943, 77 S. Ct. 963,

the Supreme Court held that the crucial question is the scope of the conspiratorial agreement, for it is that which determines both the duration of the conspiracy, and whether the act relied on as an overt act may properly be regarded as in furtherance of the conspiracy.

The Court went on to hold that acts to conceal a conspiracy after the crime had been committed does not of and by itself determine the duration of the conspiracy.

The Court stated:

> "There is not a shred of direct evidence in this record to show anything like an express original agreement among the conspirators to continue to act in concert in order to cover up, for their own self-protection, traces of the crime after its commission.
>
> *Prior cases in this Court have repeatedly warned that we will view with disfavor attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions.*" (Emphasis writer's.)

Applying the principles laid down in the *Grunewald* case to the case at bar, there was no direct evidence presented to show the scope of the conspiratorial agreement. Overt acts which concealed the crime after it had already been completed cannot show that the conspiracy began before or continued beyond the consummation of the crime. None of the overt acts set

out in the indictment were proved to have occurred before the business of wagering was entered into by Lang. Agent Spink entered the premises of Lang on April 4, 1959 and according to his testimony the business of wagering was being conducted at that time. Lang testified he began business on or about January 15, 1959. All of the overt acts set out in the indictment were proved to have occurred subsequent to that time or many years prior to January 15, 1959.

Count II of the Indictment.

Petitioner's contention with reference to the substantive offense as set out in Count II of the indictment is as follows:

(a) There was no proof that the 10% tax on wagers received from April 4, 1959 through April 30, 1959 had not in fact been paid.

(b) There was no proof that petitioner was engaged in the business of accepting wagers in his own behalf or engaged in receiving wagers on behalf of another and, hence, liable for said tax.

(c) There was no proof that petitioner knew John J. Lang was liable for the tax and had not paid it nor was there proof that petitioner aided and abetted Lang in not paying this tax.

Not one scintilla of proof was presented by the Government that any tax on wagers was owed either by Lang or petitioner during the period from April 4, 1959 through April 30, 1959 as set out in Count II of

the indictment. In fact, the testimony of Lang indicated that he had in fact paid some or all of these taxes. In the case of

Bohn v. *United States*, 260 F. 2d 773, 777 (8th Cir., 195[illegible] (cert. denied January 12, 1959),

the Court in a case of willful evasion of gambling taxes charged the jury as follows:

> "To establish its case the Government must prove beyond a reasonable doubt the following three elements:
>
> "First, that during the period charged in the indictment the defendant was engaged in the business of accepting wagers.
>
> "Second, *that substantial excise tax on those wagers was due and owing by him to the United States.*
>
> "Third, that the defendant willfully attempted to evade and defeat the tax." (Emphasis writer's.)

There was no proof that petitioner was engaged in the business of accepting wagers in his own behalf or in receiving wagers in his own behalf or engaged in receiving wagers in behalf of another. This point has heretofore been covered on page 9 of this petition but we again ask the Court to study particularly the case of

Ingram v. *United States, supra*, page 12.

because the factual situation there was stronger on behalf of the Government than in the instant case.

See also

United States v. *Calamaro, supra,* page 10.

The final point to be resolved is whether petitioner was an aider and abettor of Lang and hence liable as a principal. In order to hold petitioner as an aider and abettor, it is necessary to prove that petitioner knew Lang owed these taxes and had not paid them and the petitioner consciously shared in the criminal act.

Pereira v. *United States,* 347 U. S. 1, 98 L. Ed. 435, 74 S. Ct. 358 (1953);

Nye & Nissen v. *United States,* 336 U. S. 613, 93 L. Ed. 919, 69 S. Ct. 766 (1948).

There was no proof that Comer knew Lang owed the tax and had not paid the tax which was

"* * * a fact obviously within the knowledge of the latter."

Ingram v. *United States, supra,* page 12.

RELIEF.

For the reasons stated and upon the authorities cited, we respectfully urge that the Appellate Court erred in sustaining the District Court's ruling on petitioner's motions for acquittal and therefore his convictions should be reversed.

Respectfully submitted,

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